No. 623

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

EASTERN EXPRESS, INC., *et al.*,
Appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees

On Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division

MOTION OF APPELLEE FREIGHT FORWARDERS AND FREIGHT FORWARDERS INSTITUTE TO AFFIRM

KENNETH F. BURGESS
D. ROBERT THOMAS
FRANK M. MCHALE
DAVID M. COOK
WILLIAM F. WELCH
WILLIAM E. JENNER
JACK C. BROWN
HARRY C. AMES
JAMES L. GIVAN
S. S. EISEN
GEORGE H. LEONARD
THEODORE R. SCHNEIDER

Attorneys for Freight Forwarders and Freight Forwarders Institute

Of Counsel

SIDLEY, AUSTIN, BURGESS & SMITH
11 South La Salle Street
Chicago 3, Illinois

MCHALE, COOK, WELCH AND MCKINNEY
1006 Chamber of Commerce Building
Indianapolis 4, Indiana

JENNER AND BROWN
742 Illinois Building
Indianapolis 4, Indiana

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Pursuant to Rule 16 of the Rules of this Court, the appellee freight forwarders (whose published tariffs have been approved in this proceeding) and the appellee Freight Forwarders Institute move that the unanimous judgment of the three-judge District Court sought to be reviewed in this case be affirmed on the ground that the questions on which the decision depends are so unsubstantial as not to need further argument.

The appellee freight forwarders[1] and Freight Forwarders Institute were parties to the proceeding before

1. ABC Freight Forwarding Corporation; Acme Fast Freight, Inc.; Blue Ribbon Express, Inc.; Clipper Carloading Company, Inc.; International Forwarding Company, Inc.; Sidney B. Lifschultz, Bernice Brown, Rose Grossman, Nora Bergman and American National Bank and Trust Co. of Chicago, Trustee, a partnership, d/b/a Lifschultz Fast Freight; Midland Forwarding Corporation; National Carloading Corporation; Pacific and Atlantic Shippers, Inc.; Republic Carloading & Distributing Company, Inc.; Springmeier Shipping Company, Inc.; Universal Carloading & Distributing Company, Inc.

the Interstate Commerce Commission and were defendants by intervention in the district court proceeding.

The opinion of the District Court is reproduced in the Appendix to the Jurisdictional Statement (herein called "J.S.") at pages 1a to 19a. The Report of the Commission and its Report on Reconsideration are reproduced in that Appendix at pages 21a to 33a and 35a to 46a.

STATEMENT IN SUPPORT OF MOTION

In this proceeding certain motor carriers have sought to compel their freight forwarder competitors to cancel rates which were filed with the Interstate Commerce Commission in 1958 for the transportation between Chicago and the New York City area of shipments having minimum weights from 10,000 to 30,000 pounds. The rates for these so-called volume shipments have been in effect since various dates in 1958 and 1959 (J. S., Appendix, p. 5a). In findings which are not contested, the Commission found, among other things, that "The rates under consideration are in no instance lower than the corresponding rates of the motor-carrier protestants" and that "the considered rates are compensatory" (J.S., Appendix, pp. 39a-40a).

In the operations under these rates, the forwarders collect the individual shipments of their customers and ship the consolidated carload shipment by rail to the terminal at the destination area under rail carload rate tariffs which are not in issue here. Describing those rail tariffs, the Commission stated:

> "As noted, the rail tariffs provide for a single shipment of mixed freight not to exceed 70,000 pounds loaded into 2 trailers transported on a flatcar with a restriction that no one commodity may exceed a specified percentage of the total weight of the shipment. Therefore, to comply with the provisions of the [rail] tariffs, at least 2 different commodities must be loaded on each car." (J.S., Appendix, p. 28a)

The rail rate paid by the forwarder for the line-haul transportation is a flat charge per car for any weight up to the 70,000-pound level (J.S., Appendix, p. 9a). At the destination area, the forwarder "makes, or arranges for, distribution of each of the tendered shipments to its consignee • • • " (J.S., Appendix, p. 11a). As is traditional in freight forwarder operations, the forwarder here combines smaller shipments into a consolidated carload shipment, enabling the line-haul transportation to be made at the carload rate.[1]

The Commission decided that the challenged rates of the freight forwarders "are just and reasonable and not otherwise unlawful" (J.S., Appendix, p. 31a). The District Court concluded its opinion as follows:

> "The Commission's order of September 4, 1959 was issued after full and fair hearing, is within the scope of the statutory jurisdiction and authority of the Commission, is supported by adequate findings based upon substantial evidence, has a rational basis, and is in all respects in accordance with law." (J.S., Appendix, p. 19a)

Contrary to appellants' assertions, no elements of novelty were presented by the challenged freight forwarder tariffs for these volume shipments. The appellants err in stating in the Jurisdictional Statement that "The avowed purpose of the forwarders was, for the first time, to become competitive with the motor carriers for such traffic" (J.S., p. 9) and that this was "an admittedly new type of freight forwarder operation" (J.S., p. 11). The facts are otherwise. The tariffs and the decision of the Interstate Commerce Commission were directly consistent both with previous forwarder tariffs and practices and with the numerous previous decisions of the Commission. Moreover, there is no conflict between the decision below and any decision of the Commission or of any court.

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1. The operations of the forwarders under the rates at issue thus are within the ordinary and usual service of forwarders as described in the cases cited by appellants (J.S., pp. 12-15).

Freight forwarders have been publishing various volume rates and competing for over-10,000-pound shipments ever since Part IV of the Interstate Commerce Act (regulating freight forwarders) went into effect in 1943 (J.S., Appendix, p. 13a). As the District Court noted:

> "Plaintiffs' statements to this court on brief that the forwarders had not heretofore published rates applicable to volume shipments is contrary not only to the findings of the Commission but also to the evidence of both parties at the hearing before the Commission." (J.S., Appendix, p. 13a)

The District Court, at page 13a, then described the evidence of record as to numerous *preexisting* volume rates of the freight forwarders (still in existence at the time when the rates at issue were published) for "shipments having minimum weights of 10,000 to 30,000 pounds between the points involved in this proceeding." The Court described a fourteen-page exhibit listing such preexisting volume rates between the points here involved and then referred to the evidence showing "that thousands of volume rates for transcontinental application have been published by the forwarders, and that the forwarders for many years have been handling large numbers of shipments under their transcontinental volume rates at the relatively high minimum weights." (J.S., Appendix, pp. 13a-14a)

There was also nothing new in the approval by the Commission of freight forwarder tariffs for volume shipments. The District Court cited numerous decisions of the Interstate Commerce Commission, over the many years since 1943, involving freight forwarder rates for shipments of minimum weights ranging from 10,000 pounds to 30,000 pounds and (where the line-haul transportation was by barge) for much larger weights. As the Court stated:

> "The decision of the Commission in this proceeding is consistent with its previous decisions. The Commis-

> sion in previous decisions has approved the publication by freight forwarders of rates for volume shipments at various minimum weights over 10,000 pounds." (J.S., Appendix, p. 17a)

Moreover, the use by freight forwarders of loaded trailers in making the line-haul shipments by rail, including such use in connection with volume shipments of the weights here involved, was not new. The Commission had previously approved this very use of trailers by the forwarders. The Court, citing the cases, stated that "Prior to the enactment in 1942 of Part IV of the Interstate Commerce Act, the Commission approved rail rates for the transportation of trailers of freight forwarders and other shippers and considered such trailers to be containers or articles of commerce." (J.S., Appendix, p. 18a) The Court further noted that in other decisions after the enactment of Part IV, and long prior to this proceeding, the Commission had "approved the use by freight forwarders of rail rates for the transportation of loaded trailers of the freight forwarders," including such use in connection with "rates of a freight forwarder at minimum weights up to 30,000 pounds, under which the freight forwarder shipped its loaded trailers by rail to the point from which delivery of the shipment was made direct to the consignee." (p. 18a) The operations here were of the same kind. Both the publication of rates for volume shipments and the use by forwarders of rail rates for shipment of loaded trailers were in accordance with previous practices and decisions.

The contention of the motor carriers that the competition by the forwarders would "jeopardize the ability of motor carriers to continue to provide transportation" and would "destroy the motor carriers" (J.S., p. 8) was fully considered by the Commission and, in the light of the evidence, was found to be without merit. As the Commission stated: "The record does not support the dire predictions of the

protestants." (J.S., Appendix, p. 39a) The findings by the Commission which the District Court approved included determinations, summarized by the Court,

> "that the evidence does not permit a finding that the forwarder rates under consideration will produce a diversion in traffic sufficient to imperil the abilities of the motor carriers to survive and serve the public; that the forwarder rates are compensatory and are no lower than necessary to meet the existing competition; and that to refuse to permit the forwarders to maintain rates on the same level as those of the motor carriers would be tantamount to an attempt by the Commission to apportion traffic artificially and thereby to prevent normal, healthy competition and deny forwarders an opportunity to compete fairly with motor carriers, contrary to the national transportation policy." (J.S., Appendix, p. 12a)

The District Court noted that "The legislative history of Part IV of the Interstate Commerce Act shows that Congress was well aware that freight forwarders handled shipments weighing in excess of 10,000 pounds" and that "Congress refused to restrict competition," as the motor carriers had sought from Congress, with respect to competitive rates of freight forwarders. (p. 16a) Congress refused to adopt "proposed provisions of Part IV which, if adopted, would have made it unlawful for freight forwarders to publish rates lower than the contemporaneous rates of common carriers by railroad or motor vehicle for a like kind and quantity of property between the same points." (J.S., Appendix p. 16a) The forwarder rates here approved by the Commission, being on the same level as the motor carrier rates, thus are not even below the comparative level that the motor carriers themselves had asked Congress to establish as a floor for forwarder rates.

There is no basis for the contention of the motor carriers to the effect that what is done by the motor carriers is "for the public" but what is done by the forwarders, in provid-

ing transportation on rates no lower than those of the motor carriers, is "for their private benefit." (J.S., p. 17) Such a contention is in sharp contrast to the admonition by Congress to the Commission, in Part IV of the Act, to give due consideration, among other factors, "to the need, in the public interest, of adequate and efficient freight-forwarder service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable freight forwarders, under honest, economical, and efficient management, to provide such service." (Section 406(d); 49 U.S.C. § 1006(d))

The District Court concluded, in part, as follows:

> "Nothing in that Act and [the national transportation] policy gives, or was intended to give, to the motor carriers a right to exclude freight forwarders from competition with motor carriers for shipments of 10,000 pounds or more; nor does that Act and policy provide that competition of freight forwarders for such shipments shall be restrained by requiring freight forwarders to charge the public more for such shipments than is charged by motor carriers, or by requiring freight forwarders to charge for such shipments rates no lower per hundred pounds than the rates for smaller shipments." (pp. 15a-16a)

The provisions of the Interstate Commerce Act which are said by the appellants to be pertinent to this proceeding are quoted at pages 3 to 6 of the Jurisdictional Statement. The Act contains no provision that freight forwarders may not handle or publish rates for the transportation of shipments in the 10,000 to 30,000-pound category and contains no provision that forwarders may not, like other shippers by rail, provide the boxes or containers, including trailers used as containers, in which the various commodities are held during the course of their rail transportation on the rail cars. For the reasons stated by the Commission and summarized by the Court at pages 11a and 12a, Section 418 of the Act (49 U.S.C. § 1018) has no application to the

operations of the forwarders under the rates at issue. As to appellants' comments that the freight forwarders operate trailers in "the terminal area of the city of origin" and "within the terminal area" of the city of destination to collect and deliver the shipments of their customers (J.S., 9-10), it will be noted that the Interstate Commerce Act expressly provides for such operations to be performed by freight forwarders "as transportation or service subject to part IV when performed by such freight forwarder: * * *" (Section 202(c)(1), 49 U.S.C. § 302(c)(1); see also Section 410(h), 49 U.S.C. § 1010(h); quoted at J.S., pp. 4-5). As the Commission stated in discussing Part IV of the Act:

> "There are no restrictions as to the type of vehicle which may be utilized by the forwarders in pickup and delivery service, nor is there any requirement that there be transfer of lading. Should considerations of operating efficiency and economy so dictate, there is no sound reason why forwarders may not use trailers in their pickup and delivery service, or why a forwarder may not have loaded on a flatcar for the line-haul movement the same trailer which is used in pickup service and, subsequently, use that trailer in the distribution operation." (J.S., Appendix, pp. 40a-41a)

In accordance with the provisions of Section 410(h), cited by appellants, the forwarders, in their operations under the rates at issue, do not "conduct any direct railroad * * * operations." Like other shippers of loaded trailers by rail under the rail Plan III TOFC rates, the forwarders tender their shipments to the railroads for the line-haul transportation between the terminal areas, and, like other shippers, the forwarders pay the rates published by the railroads for the performance by the railroads of that line-haul transportation. The "spread between the freight forwarder rates [to their customers] and the rail carload rates used by the forwarders for rail movement of consolidated forwarder shipments" (J.S., Appendix, p. 9a) provides the revenues from which the forwarders cover their other expenses and derive their profits. By the

consolidation of shipments which, individually, are far below the 70,000-pound weight provided for in the rail Plan III TOFC rates, the forwarders are able to obtain the carload rate under those rail tariffs. Even if these operations were unprecedented, which they are not, they would be entirely lawful.

At page 16 of the Jurisdictional Statement, appellants state:

> "Moreover, the Commission has also permitted the forwarders to compete for the first time on a broad and comprehensive scale with the physical carriers for volume and trailerload traffic as to which traffic the forwarder functions of consolidation and break-bulk are not performed."

The incorrectness of the first part of this sentence has been shown above; this was by no means the first time that the forwarders have competed for shipments of the 10,000 to 30,000-pound weights and, moreover, the competition of forwarders for shipments of these weights was known to Congress when it adopted Part IV, was not restricted by Congress, and has repeatedly been approved by the Commission. The last part of the quoted sentence, regarding performance of the forwarder functions, is contrary to the well-supported findings of the Commission which were approved by the District Court. After summarizing the Commission's findings describing the physical operations at the origin and destination areas, the Court stated:

> "The Commission concluded that in the ordinary and usual course of their business, the forwarders will perform the services contemplated by Section 402(a) of the Interstate Commerce Act, 49 U.S.C. Section 1002(a)." (J.S., Appendix, p. 11a)

Later in its opinion, the Court stated:

> "Under their operations described in the reports of the Commission in connection with the handling of shipments to which these freight forwarder rates apply, the freight forwarders, in the ordinary and

usual course of their undertaking, would perform all of the services contemplated by Section 402(a)(5) of the Interstate Commerce Act." (J.S., Appendix, p. 16a)

The Court's summary at pages 10a and 11a of the Commission's description of the physical operations of assembly and consolidation of the individual shipments into one carload shipment at the carload rate, and the breaking of the bulk of that consolidated shipment and the distribution of the individual shipments at destination shows plainly that these quoted findings and conclusions of the Commission and the Court were correct.

The well-reasoned opinion of the District Court and the reports of the Commission show that there is no significant or novel question presented by the appellants. The decision of the statutory three-judge court should be affirmed, on the ground that the questions on which the decision depends are so unsubstantial as not to need further argument.

Respectfully submitted,

KENNETH F. BURGESS	JACK C. BROWN
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Attorneys for Freight Forwarders and Freight Forwarders Institute

Of Counsel

SIDLEY, AUSTIN, BURGESS & SMITH
11 South La Salle Street
Chicago 3, Illinois

MCHALE, COOK, WELCH AND MCKINNEY
1006 Chamber of Commerce Building
Indianapolis 4, Indiana

JENNER AND BROWN
742 Illinois Building
Indianapolis 4, Indiana

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